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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)	No. CR-11-00955 DLJ
)	
Plaintiff,)	DEFENDANT’S SENTENCING
)	MEMORANDUM
vs.)	
)	Date: April 11, 2013
LINDA GOMEZ,)	Time: 10:00 a.m.
)	
Defendant.)	
)	

INTRODUCTION AND FACTUAL BACKGROUND

Defendant Linda Gomez’s devotion to the care for seniors and the disabled over her adult lifetime earned her the continuing admiration of those who knew her both before and after her offense in the instant case, even those the Probation Office maintains are “vulnerable victims” of her offense. Sister Sally Slyngstad, formerly the Province Leader for the Sisters of the Holy Names of Jesus and Mary, acknowledges Ms. Gomez’ embezzlement from the Order’s Los Gatos convent but writes of “her compassion, care and concern for our elderly sisters and her long work hours on their behalf. She went above and beyond the call of duty in their service, often at the expense of her family.” Exh. B. Sister Jo’Ann De Quattro, a member of the provincial leadership team from 1992 to 2000, even while expressing her grief at learning of Ms. Gomez’ offense emphasizes that Ms. Gomez was “a capable, caring, devoted manager” who

1 “taught employees the food service trade from dishwasher to become a head chef if that was
2 what they wanted to achieve.” Exh. C. Sister Joan Doyle, the Community Life Coordinator for
3 the sisters at the Convent from 2001 to 2009, writes:

4 Linda’s good will and wonderful spirit was seen daily in her relations with the staff
5 members and especially with the Sisters. It was never too much trouble for her to listen
6 to the many concerns and needs of the Sisters. They felt welcome to go to her office,
7 write her a note, or just meet her in the halls and seek some advice. She always made
8 time for them, and followed through on their requests, because she cared about each one.
9 . . . She was a dear and trusted woman who cared deeply about the Sisters and was very
10 generous with her time and talents. She was such a joyful person even in difficult
11 circumstances.

12 Exh. D. The recognition of Ms. Gomez’ good works was not limited to these three sisters, who
13 are united in their request for a non-custodial sentence: Leen Breesch, a lay employee of the
14 Convent from 1989 to 2000, describes Ms. Gomez as “a good hearted woman to every one
15 around her, especially to the sisters. Her biggest concern was for the sisters to be happy and feed
16 them the food that they loved. . . . Nothing was too much for her and she truly loved the sisters
17 and was good for the kitchen staff.” Exh. E. These letters to the Court, selectively excerpted in
18 the presentence report, are representative of an enduring recognition within the Convent
19 community of Ms. Gomez’ good works over nearly 25 years of service, a recognition reflected as
20 well in a larger group of sisters’ private and unsolicited communications to Ms. Gomez long
21 after the discovery of her offense, a small sample of which are attached as Exhibits F through U.

22 Ms. Gomez was first drawn to work with seniors and the mentally disabled once her three
23 children were of age to attend school, attending college classes to prepare her for this work. PSR
24 ¶ 45. For ten years thereafter, she managed lunch programs for municipal senior centers and
25 trained disabled students for employment in food service. In 1986, she was hired by Healthcare
26 Dietary Service as a manager and was soon assigned on a contract basis to work at the Los Gatos
convent of the Sisters of the Holy Names. PSR ¶ 45; 4/3/13 Letter of Lenae Mooney, attached as
Exh. A. She began work at the convent as a cook but quickly earned an excellent reputation with
her devotion to the sisters; eventually she was hired away from Healthcare Dietary Service,

1 becoming the manager of the convent kitchen and eventually the manager for housekeeping and
 2 purchasing. As noted by daughter Lenae Mooney: “The sisters became the second family she
 3 took care of. She lived and breathed that job. She cried with them, celebrated with them, and
 4 was there for many as they lived their last days.” *Id.* Ms. Mooney adds, “This was the perfect
 5 job for [Ms. Gomez] as she has always been the person who took care of everyone.” *Id.* Julie
 6 Harrigan, the former administrator for the Convent, joined the Convent several years after Ms.
 7 Gomez and recalls that Ms. Gomez struck her as “exceptionally supportive of all of [the sisters],
 8 from the youngest to the oldest, above and beyond her job duties, and she earned my respect. . . .
 9 She clearly loved the sisters and was committed to their well-being and happiness, and she was
 10 adored by them in return. We all thought she walked on water, and she and I became friends.”
 11 Declaration of Julie Harrigan, ¶ 12.

12 Ms. Gomez, however, came under an unprecedented combination of hardships starting
 13 near the end of her second decade of service: after a personal bankruptcy, Ms. Gomez and her
 14 family learned that her husband was suffering from late-stage lung cancer stemming from
 15 childhood exposure to radiation and carcinogens while growing up in Arizona near a nuclear test
 16 site. PSR ¶ 48. Ms. Gomez and her family understood the diagnosis to mean he had little life
 17 expectancy, especially after a family friend diagnosed at the same time by the same doctor died
 18 within the year. *Id.* at ¶ 48 and Attachment A. Ms. Gomez was solely responsible for shuttling
 19 her husband to and from concurrent chemotherapy and radiation treatments while also
 20 continuing full time at work. *Id.* At the same time, her middle son, a DSL installer, relapsed
 21 into opiate addiction unbeknownst to Ms. Gomez after suffering a workplace injury and began
 22 exhibiting the acute financial distress that she only later would recognize as a collateral
 23 consequence of his addiction. *Id.* Her youngest son, a San Jose police officer, had been living in
 24 Modesto to moderate his cost of living but nonetheless was losing his home to foreclosure. Exh.
 25 A. The financial stress she incurred in her efforts to help her family, her fears for her husband,
 26 and the emotional strain of juggling her personal and professional responsibilities in an

1 increasingly unforgiving environment eventually led her to embark on a pattern of compulsive
 2 shopping and cash withdrawals using the Convent's corporate credit cards.

3 ARGUMENT

4 Notwithstanding the application of USSG § 2B1.1, which the defense submits would
 5 advise a range of 21 - 27 months, a significant variance is warranted under 18 U.S.C. § 3553(a)
 6 to reflect the extraordinary circumstances under which she ultimately deviated from an otherwise
 7 exemplary history of dedicated service to the sisters of the Convent, the wishes of the Convent
 8 members who knew her best, and the exceptional burden that a sentence of imprisonment will
 9 impose upon her family, given her husband's poor health and inability to care for himself. A 12-
 10 month term of home confinement and lengthy probation grant, under these unique
 11 circumstances, would be sufficient and no greater than necessary to achieve the purposes of
 12 sentencing. As another sentencing court observed in *Gall v. United States*, 552 U.S. 38 (2007),
 13 "probation, rather than an act of leniency, is a substantial restriction of freedom." *Id.* at 44
 14 (internal quotations omitted). The district court went on to explain:

15 [The defendant] will have to comply with strict reporting conditions He will not be
 16 able to change or make decisions about significant circumstances in his life, such as
 17 where to live or work, which are prized liberty interests, without first seeking
 18 authorization from his Probation Officer or, perhaps, even the Court. Of course, the
 19 Defendant always faces the harsh consequences that await if he violates the conditions of
 20 his probationary term.

21 *Id.* The Supreme Court concurred, noting that even the standard conditions of probation
 22 "substantially restrict [probationers'] liberty." *Id.* at 48. In the present case, Ms. Gomez' age
 23 and compromised mobility, her role as her husband's caregiver, and the clear evidence of her
 24 honorable service for the vast majority of her employment with the Convent, a Guidelines
 25 sentence of imprisonment would constitute disproportionate punishment.

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I. The Advisory Guidelines Range is Overstated

A. The Vulnerable Victim Enhancement Does not Apply

As a threshold matter, the defense submits that the advisory guidelines range is 21 to 27 months, rather than the 27 to 33 months calculated by the United States Probation Office, because it is the corporate entity of the Sisters of the Holy Names of Jesus and Mary – not the individual sisters of that order – that was the victim of Ms. Gomez’ offense within the meaning of USSG § 3A1.1(b)(1), and the government has established neither any particular vulnerability on the part of the order or its provinces, nor any injury or loss to any individual sister, vulnerable or otherwise.

1. The Victim of the Offense is the Administration of the Convent, Not the Sisters

Ms. Gomez’ fraud consisted of inducing the Convent administration to pay for her use of the corporate credit card accounts to make purchases that she contended were properly billed to the Convent’s budget, specifically the budget she managed for food services and housekeeping and purchasing for the community. The Convent budget, approximately \$4.3 million in 2009, was separate and distinct from the individual sisters’ personal budget allocations, though both were funded from the same master account maintained by the California province of the Order. *See Declaration of Julie Harrigan, ¶¶ 3, 14.* As Sister Joan Doyle recognized in her letter to the Court, “I believe that she did not intend any harm to the elder Sisters or the staff.” Exh. D. The sisters’ personal budgets were determined by the province on an annual basis, based upon the sisters’ projected needs for the year, not on the financial condition of the Convent or province as a whole, and represented a tiny fraction of both the wealth of the Order and the personal contributions they made to it through their surrendered personal retirement benefits. There is no evidence of any impact on these personal budget allowances as a consequence of Ms. Gomez’ embezzlement from the Convent budget (\$4.3 million in 2009), nor is there any evidence that Ms. Gomez’ fraud jeopardized the Convent budget, the province’s financial health or any of the

1 Convent's customary activities. On the contrary, Ms. Gomez never exceeded the annual budgets
 2 approved in advance for food services, housekeeping or community purchasing. The sisters
 3 themselves were not, therefore, victims of Ms. Gomez' offense conduct.

4 **2. Even if the Sisters Could be Deemed Victims of the Offense, They**
 5 **Were Not Unusually Vulnerable**

6 A victim is "unusually vulnerable" when she is "less able to resist than the typical victim
 7 of the offense of conviction." *United States v. Wetchie*, 207 F.3d 632, 634 (9th Cir. 2000); *see*
 8 *also United States v. Luca*, 183 F.3d 1018, 1027 (9th Cir. 1999) (stating that the district court
 9 must point to facts that made the victim "less able to defend [herself] than a typical victim");
 10 *United States v. Nielsen*, 694 F.3d 1032, 1034-35 (9th Cir. 2012). It is not sufficient to invoke
 11 the age or infirmity of any the sisters, without any evidence that their age or physical condition
 12 made them particularly susceptible to Ms. Gomez' embezzlement. *See, e.g., United States v.*
 13 *Lee*, 973 F.2d 832, 834 (10th Cir. 1992) (reversing imposition of enhancement for bank
 14 employee who embezzled funds by helping elderly female customers fill out deposit slips and
 15 redirecting their deposits to accounts under her control). Nor is it sufficient that a person or
 16 persons have been an "instrumentality" to a defendant's scheme as opposed to a victim of it.
 17 *United States v. Johns*, 686 F.3d 438, 459 (7th Cir. 2012).

18 To the extent that the Probation Office presumes the sisters to have been "trusting in
 19 nature from the dogma of their religion," there is no evidence to suggest that this in any way
 20 impacted the lay administration's decisions to reimburse or not Ms. Gomez' use of the Convent's
 21 corporate card from the Convent budget. Moreover, the sisters' religious faith did not render
 22 them insensible, incompetent or impaired to a degree that renders Ms. Gomez' conduct more
 23 depraved than the uncontested application of the abuse of private trust enhancement already
 24 reflects. The Probation Office contrasts the individual sisters' modest personal budgets with Ms.
 25 Gomez' expenditures but disregards the bare fact of the sisters' election to surrender any
 26 personal assets. The relevant comparison is not as between Ms. Gomez' lifestyle and that

1 chosen by the sisters, but between the competency or unusual inability of those individual sisters
 2 deemed victimized by the offense to detect or protect against fraud, as against the typical victim
 3 of fraud. The sisters, to the extent that the Probation Office persists in conflating these
 4 individuals with the corporate entity of the Convent or province, had the benefit of lay
 5 administrators, treasurers, accountants, lawyers and bookkeepers to scrutinize budgets and
 6 expenditures, as well as comprehensive insurance against employee fraud.

7 **B. A Variance is Warranted to Mitigate the Application of USSG**
 8 **§ 2B1.1(b)(9)(A)**

9 Although an adjustment under USSG § 2B1.1(b)(9)(A) may appropriately be imposed
 10 under the prevailing interpretation of that Guideline, a downward variance is warranted to
 11 account for the circumstance that Ms. Gomez did not exploit the charitable or religious impulse
 12 of the organization's financial administration in inducing them to fund the expenses for which
 13 she sought reimbursement, in contrast to the more typical scenario in which such an adjustment
 14 is imposed.

15 USSG § 2B1.1(b)(9) authorizes the Court to impose a two-level increase where a
 16 defendant misrepresents, as part of a scheme to defraud, that she is acting on behalf of a
 17 charitable or religious organization or a government agency. The illustrative examples provided
 18 by the Commission in the Application Notes each involve the fraudulent solicitation of
 19 contributions by appealing to the charitable impulses of victims through false claims that the
 20 contributions would fund a qualifying organization:

21 Subsection (b)(9)(A) applies, for example, to the following:

- 22 (i) A defendant who solicited contributions for a non-existent famine relief organization.
- 23 (ii) A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.
- 24 (iii) A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant's personal benefit.

26 *Id.* at n. 7. The courts are divided on the application of this enhancement in cases where, as here

1 the defendant did not exploit the generosity, charitable motives, or trusting impulses of the
2 victim. The Ninth Circuit, and the majority of circuits, has held that the enhancement applies so
3 long as the defendant misrepresents her affiliation with the qualifying organization and/or her
4 capacity to act for the organization, whether or not the victim was motivated by charitable
5 impulse to succumb to the scheme to defraud. *See United States v. Lambert*, 498 F.3d 963 (9th
6 Cir. 2007); *United States v. Berger*, 224 F.3d 107 (2d Cir. 2000); *United States v. Bennett*, 161
7 F.3d 171 (3d Cir. 1998); *United States v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *United States*
8 *v. Wiant*, 314 F.3d 826 (6th Cir. 2003); *United States v. Reasor*, 541 F.3d 366 (5th Cir. 2008);
9 *United States v. Ferrera*, 107 F.3d 537, 543 (7th Cir. 1997). However, the Tenth Circuit
10 requires exploitation of charitable motive: “the conduct intended to fall within the scope of the
11 guideline is exploitative conduct which induces victims to act upon their charitable or trusting
12 impulses due to the defendant’s misrepresentation that he has authority to act on behalf of a
13 charitable, educational, religious or political organization or a government agency.” *United*
14 *States v. Frazier*, 53 F.3d 1105, 1113 (10th Cir. 1995).

15 Ms. Gomez made no appeal to the charitable or spiritual impulses of the Convent
16 administration: the Convent had a pre-existing duty to provide for the sisters who resided there
17 and to fund the various budgets it had approved for the different Convent managers. Ms.
18 Gomez’s misrepresentations were made to the Convent administration, the same entity on whose
19 behalf she claimed to be spending the funds sought, not to some third party whose generosity
20 prompted a charitable contribution or tithing. The defense does not dispute that under Ninth
21 Circuit law, application of the enhancement is warranted. However, this Court is free to grant a
22 variance from the advisory range thereby calculated, if it finds that under the circumstances
23 presented in this case – the uncontested imposition of a two-level enhancement for abuse of trust
24 and the absence of any exploitation of charitable motive – unmitigated imposition of the
25 enhancement would result in an unreasonable sentence.

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II. A Substantial Downward Variance from the Advisory Range is Warranted, Due to Mitigating Factors Relating to Ms. Gomez' Background and History

A. Ms. Gomez' Offense Conduct Was Fueled by the Emotional And Financial Strain from the Convergence of Multiple Extraordinary Familial Pressures

Ms. Gomez' employment at the Convent was in all respects exemplary prior to her commencement of the offense conduct. Despite having been directed to have no involvement with the case, a number of sisters have continued to reach out to Ms. Gomez subsequent to the widespread publication of government press releases regarding the offense. Their expressions of support for her in spite of her crimes reflects the extent to which they appreciate that her offense conduct was highly uncharacteristic of the person the sisters had grown to love and respect:

How blessed I am to have known both of you! . . . You have been an inspiration of goodness and generous love to all!

[Y]ou are in my thoughts and prayers each day. It is so puzzling why some "experiences" come into our lives however it is important for you to know how much so many folks love and support you!

We miss you – I hope things are going better – some day our lives may get more normal with God's help.

We miss you and continue to pray for the best outcome for you and your family. Just knew we love and continue to support you. . . . You [are] in our prayers and thought always with much love and gratitude for you both.

I read the article in the paper this morning. My heart goes out to you. Whatever occurred I have very fond memories of working with you at the convent, and I will remember your many kindnesses to me and the sisters.

Exhs. F - U. These are the sisters whom the Probation Office would denigrate as blindly trusting in their Christian charity, as though they were unfamiliar with post-Edenic concepts of sin and human failing, but these sisters have been able to see past the caricature of Ms. Gomez invited by media reports and to discern that her commission of the offense against the Convent treasury does not negate the exceptional personal good will and devotion that she had long demonstrated in their service. They likewise have discerned that the circumstances which fed Ms. Gomez' compulsion to steal from the Convent finances were substantially mitigating.

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1 The defense does not suggest that Ms. Gomez was entitled to the money she embezzled
 2 by virtue of her family circumstances, or that she acted out of necessity: Ms. Gomez accepted
 3 responsibility for her offense, signaling her intention to plead guilty early in these proceedings
 4 and ultimately pleading guilty to all 17 counts of the indictment. However, her resort to the
 5 Convent credit card was the product of significant emotional anguish, rather than cavalier or
 6 antisocial disregard; her attempts to conceal those compulsive expenditures were in turn a
 7 desperate and dishonorable effort to keep the evidence of her weakness from the administration
 8 whose trust she had once worked so hard to earn.

9
 10 **B. A Variance is Warranted in View of the Heightened Burden of Incarceration
 on Ms. Gomez and Her Family**

11 Although her husband is in remission from his lung cancer, the continued impairment of
 12 his respiratory function – due to chronic obstructive pulmonary disease and the scarring of his
 13 lungs due to the cancer – leaves him susceptible to lung infections and pneumonia, including a
 14 recent hospitalization during which Ms. Mooney believed he would not recover. Exh. A. He has
 15 also suffered two heart attacks, the second in the immediate aftermath of the media reports of
 16 Ms. Gomez’ indictment. *Id.* The combination of his age and the grueling course of
 17 chemotherapy he underwent in 2007 has left him sufficiently forgetful that he cannot
 18 independently keep track of either his medications or his medical appointments. *Id.*
 19 Consequently, Ms. Gomez has dedicated herself to being his 24-hour/day care-giver, in spite of
 20 her own limited mobility. *Id.* Moreover, Ms. Gomez and her husband relocated to Arizona
 21 because they were unable to afford the cost of living in this district on Social Security and John
 22 Gomez’ modest pension. Because her Social Security benefits will be suspended for the duration
 23 of any term of imprisonment, her husband will be unable to remain in their current residence.
 24 While all of the three children would unhesitatingly take in their father, none of them lives in a
 25 home that could accommodate his limited mobility, and none is in a position to provide him with
 26 the round-the-clock care that Ms. Gomez has traditionally provided.

